IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 474 of 1996

with

CIVIL REVISION APPLICATION No 645 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SURAT MUNICIPAL CORPORATION

Versus

AMBALAL PURSHOTTAM MISTRY

Appearance:

1. Civil Revision Application No. 474 of 1996
   MR PRASHANT G DESAI for Petitioners
   MR HARSHAD J SHAH for Respondent No. 1
   MRS KETTY A MEHTA for Respondent No. 3

2. Civil Revision ApplicationNo 645 of 1996
   MRS KETTY A MEHTA for Petitioners
   NOTICE SERVED BY DS for Respondent No. 1, 3
   MR HARSHAD J SHAH for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 30/03/2000

ORAL JUDGEMENT

These two revision applications have been filed under sec. 115 of the Code of Civil Procedure, 1908 against the same judgment and order passed by the courts below, therefore, both the revision applications have been heard together and are being disposed of by this common order.

The respondents in these revision applications namely, Ambalal Purshottam Mistry and Chimanlal Gopaldas Panchal instituted Regular Civil Suit NO. 536 of 1990 against the Town Development Officer, Surat Municipal Corporation and Gujarat Housing Board for certain reliefs and they have also claimed interim relief pending hearing and final disposal of the aforesaid civil suit. The temporary relief as sought for was granted by the learned trial judge in the said Reg. Civil Suit No. 536 of 1990. The petitioners in these revision applications felt aggrieved by the said judgment and order of the trial court have preferred Civil Misc. Appeals before the District Court, Surat, which came to be dismissed and, therefore, being felt aggrieved by the said judgment and order, the petitioners have preferred these two revision applications before this Court.

The civil revision application filed by the Gujarat Housing Board has been registered as Civil Revision Application No. 645/1996 whereas the civil revision application filed by the Surat Municipal Corporation has been registered as Civil Revision Application No. 474/1996.

The facts may be briefly stated as follows:

The aforesaid original plaintiffs have been residing in block no. 33/239 and 34/249 of the Gujarat Housing Board, Khatodra colony at Surat. The colony also have several other blocks. The said colony was constructed in the year 1957, according to the case of the respondent. The respondents contended before the trial court that there is a highway known as Surat-Udhana-Navsari High way little away from the said block and, there was an open space between their blocks and the said high-way. That the said respondents had a right of passage over the said open space for going to the said highway. It is the case of the respondents that

the Housing Board initially prepared some plans and submitted them to the Surat Municipal Corporation.That the respondents objected to the said plans and Surat Municipal Corporation refused sanction for the construction of building as per the said plan. That thereafter, the position was changed with respect to the office bearers of the Surat Municipal Corporation. That plans were submitted afresh and they were sanctioned. That the Housing Board has now been permitted to raise building in the said open space. The respondents have contested that the Housing Board has no authority to construct anything there in the said open space and the Municipal corporation had no authority to sanction plans and estimate permitting the construction ofbuilding in the said open space. The respondents, therefore, challenged the said action on the part of the Municipal Corporation as well as on the part of Housing Board and prayed for injunction preventing the corporation as well as board from raising construction in the said open space.

By way of application exh. 5, the respondents prayed for interim injunction preventing the corporation as well as board from raising any structure on the disputed space.

It seems that interim injunction was granted at the initial stage and it was made absolute, pending hearing and final disposal of the suit by the learned Civil Judge (SD), Surat.The matter was carried in civil misc. appeal and there also the corporation as well as board felt aggrieved and,therefore, these revision applications have been filed by the corporation and board.It has been contended here that the courts below have committed serious error and illegality releting to the jurisdiction in allowing the application for interim injunction. It is, therefore, prayed that the revision applications be allowed and the orders passed by the courts below be set aside.

I have heard Mr. PG Desai learned advocate for Surat Municipal Corporation and Mrs. KA Mehta for Housing Board and Mr JG Shah for the respondents and have perused the papers made available to me while the matter was under process of hearing.

It is true that two petitioners have brought these revision applications under sec. 115 of Code of Civil Procedure.The powers of this court for entertaining revision petitions are limited and, therefore, the courts will have to be slow in dealing with the matters coming

to it under sec. 115 of Code of Civil Procedure. The provisions contained in sec. 115 of CPC may be reproduced for ready reference as follows:

115. [(1)] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court andin which no appeal lies thereto, and if such subordinate Court appears-

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

[Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where-

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or

(b) the order, if allowed to stand, would occassion a failure of justice or cause irreparable injury to the party against whom it was made.]

[(2)] The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

Explanation: IN this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceedings.]

On this aspect, the learned advocate for the respondents has relied upon certain decision and,

therefore, we may consider them before going to the merits of the case.

In case of Nalinbhai M Shal vs. Vsinagar Nagrik Sahakari Bank Ltd., reported in 1996(1) GLH 522, this Court has referred the provision contained in sec. 115 of Code of Civil Procedure and has observed that having regard tothe facts and circumstances emerging in the present revision application none of the aforesaid points is attracted. The impugned order granting amendment in the execution petition is a question of exercise of powers under O. VI, R. 17 of the Code in the light of the facts of the case. There is no question of law involved. There is no jurisdictional error. IN the circumstances, the revision application was dismissed by this Court.

Almost, similar view was taken in the case of Kesarben Dhulaji Prajapati vs.Amarsingh Baldevsingh, reported in 1996(1) GLR, p. 71. There,it has been observed that concurrent finding of lower courts on facts cannot be set aside unless the petitioner shows that the impugned orders shall occasion "a failure of justice or cause irreparable injury."

The third decision relied upon by the learned advocate appearing for the respondents is in the case of The Managing Director (MIG) Hindustan Aeronautics Ltd. vs. Ajit Prasad Tarway,Manager (Purchase and Stores) Hindustan Aeronautics Ltd., reported in AIR 1973 SC 76. There also similar view has been taken and it has been observed that if lower appellate courts order is within its jurisdiction than High Court should not interfere even if the order is right or wrong or in accordance with law or not, unless it has exercised its jurisdiction illegally or with material irregularity.

The fourth one is a case of Vadodaria Vadilal Hirachand vs. Thakar Jayantilal Maganlal, reported in 1996(2) GLR 413. There also similar view has been adopted. It has been observed in it that when impugned decision is neither perverse nor erroneous in law, High Court willnot substitute its finding for one reached by lower court by re-appreciating the evidence merely because it differs from the conclusion of the lower court.

Therefore, we are required to consider the aforesaid principle before disposing of the civil revision applications.

Now, it has to be considered here that so far as the orders of the lower courts are concerned, they are discretionary orders under Order 39, Rule 1-2 of Code of Civil Procedure. The lower appellate court was acting as a court of appeal but the appeal was miscellaneous appeal and, therefore, its power was also limited. This fact cannot be ignored or overlooked.

At the same time, it has to be considered that since two courts below were required to pass discretionary orders under Order 39, Rule 2 of Code of Civil Procedure, both the courts were required to consider three aspects, which are very well known. The plaintiff has to show prima-facie case,than, the plaintiff has also to show that balance of convenience was in his favour and, again the plaintiff was further required to show that in case injunction is refused, he would suffer irreparable injury which cannot be compensated in terms of money. All the three ingredients were required to be satisfied. They were required to co-exists.If any of these three ingredients is missing, the trial court could have granted relief in favour of the respondents.

If we go through the papers, it is very clear that as per the blue print produced by the petitioners before thetrial court, the respondents are occupying blocks no. 33 and 44. The blue print shows that there is a pakka road having width of 30 feet in between block no. 33 and 34. Than, the blue print further shows that the said road directly touches Surat-Udhana-Navsari high-way. If we peruse the documents, it prima-facie appears that the respndents having their blocks no. 33 and 34 have aforesaid 30ft. wide road just abutting their blocks and proposed construction in dispute is not on this road. In fact, the proposed construction is to be made on the back side of the block no. 34, therefore, if the blue print is perused, it is prima-facie clear that the passage of the respondents is not likely to be obstructed if the construction as proposed is permitted to be made. In fact, the road is on one side of block no. 34 and the proposed construction is on the otherside of it. So far as block no. 33 is concerned, the proposed construction is nowhere near the block no. 33. Therefore, it is prima-facie clear that the respondents are not and were not likely to suffer any inconvenience or irreparable injuryif the injunction was refused and the construction was allowed to be made.

On the contrary, on a bare looking of this blue print, it becomes very clear that the proposed

construction is not likely to obstruct the passage of the respondents.

Another aspect of the case is that there may be several open space around the block allotted toa particular individual. This does not mean prima-facie that the owner of that block would be entitled to use each and every inch of the said open space but has to become a reasonable user of his surroundings. When there is public road of 30ft width on one side of his block, he cannot claim any right on passage prima-facie on the otherside of the block where there is no road,but there is simply an open space, therefore, prima-facie it cannot be said that the respondents have a right of passage over the said space.

Now it has to be considered that so far as owner of block no. 33 is concerned, he will first go to the 30 ft road, than there will be block no. 34 and thereafter, a space for the proposed construction.Therefore, in order to go to the disputed place,the owner of block no. 33 will be required to cross the road and cross block no. 34. It is not shown as to how he will be entitled to go to that space prima-facie. Therefore, it cannot be said primaa-facie that these two persons will face irreparable injury and inconvenience if the injunction is refused.

Another aspect of the case is that the petitioners in these petitions have made it clear that the construction will not directly abut the property of the respondents i.e. block no. 33 and 34. It is also their case that margin land still remains open and construction is not going to be made on the margin land. In that view of the matter, it cannot be said that the petitioners have committed illegality in sanctioning the plans and in raising constructions according to the plans.

Than, it is interesting to note that if we peruse plaint, we will find relief clause in Para-12. It is not clear if there is any typographic error or the original plaint stands as it is, we find in the copy supplied to the Court, wherein para-12 shows that in both the sub-paras the respondents have claimed relief for ad interim injunction and there is no prayer for perpectual injunction, however, if there is a typographical error it can be corrected.

It has to be considered that the respondents have claimed that the land in question vests in the Surat Municipal Corporation and not in the Housin Board. Now

the Housing Board construct houses for the residents of Surat,and, therefore,if there is an agreement between them for alloting the land to the Housing Board to raise construction in the aforesaid land, then the respondents cannot have any grievance about the same. Therefore, even that point cannot help the respondents prima-facie.

An attempt has been made to show that the proposed construction is going to be raised on road line, but the above blue print makes it clear that the road is situated at different place and the construction is being made at a dififerent place. It seems that the construction is going to be raised in an open space which is not a part of road line.

Another aspect of the case is that as per the case and arguments of the respondents, the road is high-way and, therefore, under the Ribbon Development Rules, the requirement is that the construction cannot be raised within a particular area from the centre of the road. Now on the other hand, it is a case of the present petitioners that when the high-way passes through the city area of the corporation, than it is a city road and not high-way and, therefore, rules and regulations releting to the city road will apply to this road and, therefore, it would not be necessary to keep open space which is required to be kept open for construction around high-way. Now, no other point of law has been shown to me in order to show that the petitioners will be required to keep open space according to the requirement of the high-way, even in the case of road passing through the city or town.

It has also been contended on behalf of the respondents by their learned advocate that the respondents have not been heard before sanctioning the plans. Now it is a fact that their objections were there earlier and they were probably considered while disallowing the plans and estimate submitted by the Board to the Municipal Corporation, but it seems that there is subsequent change in the decision of the corporation.It seems that as per the case of the respondents, they have not been heard. However, this is a matter between the corporation and the board and it is not shown as to how they were entitled to be heard.

As stated above, the blue print makes it clear prima-facie that passage has not been obstructed and the open space is just on the otherside of block no. 34. Under the circumstances, even if the respondents have not been heard, it does not appear to be a matter which can

be said to be an illegal action on the part of the present petitioners.

It has also been argued that the aforesaid action was initially challenged by way of Special Civil Application No. 6924/98 by the respondents and others and this court prima-facie found that there is no substance in the matter but subsequently, it was observed that factual aspects were involved and, therefore, it is better if the petitioners to the said petition would go to the Civil Court. Any way, the aforesaid special civil application was not probably disposed of on merits and the observations made therein will not be useful for the purpose of deciding the present revision applications.

It has also been argued by the learned advocate on behalf of the respondents that the matter is likely to be disposed of on appreciation of documents and there is very little scope for submission of oral evidence and, therefore, the matter can be disposed of within a month. Hence, instead of allowing the revision applications, this Court may direct the trial court to dispose of the suit.

It is true that the suit is around 10 years old. Since it has been filed in the year 1990, but at the same time, the experience shows that some times it is not possible for the trial court to dispose of the case in accordance with the directions of this Court. There may be several reasons for not disposing of the case even the time limit is prescribed by this court. It is true that in the present case, learned advocate for the respondents has assured that there will be full co-operation on the part of his clients in early disposal of the suit, but at the same time, even if there is bonafide on the part of the respondents, the things are not as smooth as we think and, therefore, it may not be possible in all cases to dispose of the case within time limit specified by this Court.

At the same time, it has also been argued that if the construction is permitted, the things will be changed and the respondents might not get any relief ultimately. Now whatever construction may be permitted hereinafter, would naturally be subject to the ultimate decision in the suit and the petitioners in these two revision applications are very well aware of the consequences of their action. In that view of the matter, it cannot be said that the court should direct for expeditious disposal of the suit. In the aforesaid view of the matter, it can also not be said that the construction

during the pendency of the suit will permanently deprive the respondents from ultimately getting a decree in their favour.

Moreover, when it has been positively submitted that the margin land is still going to be open and therefore, there is no prima-facie case in favour of the respondents and this aspect has not been properly appreciated and considered by the courts below. Even the blue print shows that the proposed construction is not immediately touching block no. 34. There would still be some open space between block no. 34 and proposed construction. Than so far as office building is concerned, is further away from block no. 34. So far as block no. 33 is concerned, it is far more away from the proposed construction of office building and other building in another plot in the same locality.

In the aforesaid view of the matter, it is very clear that though there is no prima-facie case in favour of the respondents, no balance of convenience is in their favour and no irreparable injury likely to be caused to the respondents, the trial court has granted injunction and the lower appellate court has confirmed the same. It is very clear that the aforesaid two courts below have passed the order by merely asserting that there would be inconvenience and irreparable injury. In that view of the matter, it has to be held that the courts below have committed material irregularity and jurisdictional error in exercising the powers under Order 39,Rule 2.

Naturally, when the construction is not permitted for very long time, though there is no inconvenience or irreparable injury than apart from the inconvenience or irreparable injury to the Housing Board, there would be further inconvenience and irreparable injury to the persons who may be required to use additional structure which may be constructed on the disputed space.

Moreover, there would be increase in the costs in future when the construction is ultimately permitted at the close of the trial court. The suit cannot be disposed of very soon and 10 years have already gone. IN that view of the matter, it can be said that the aforesaid orders of the courts below have resulted into miscarriage of justice and there would be irreparable injury to the petitioner Board and petitioner Board in particular. In the aforesaid view of the matter, I am of the view that this Court should exercise its power under sec.115 of the Code of Civil Procedure and should

interfere with the orders passed by the courts below.

The result is that the courts below have committed jurisdictional error in passing the orders in favour of the respondents and it has resulted in failure of justice and irreparable injury to the present petitioners.

In the aforesaid view of the matter, the orders passed by the courts below are required to be quashed and set aside. Hence, the present civil revision applications are ordered to be allowed. The orders passed by the courts below in CMA as well as in regular civil suit for temporary injunction are ordered to be quashed and set aside and interim application of the respondents before the trial court in the aforesaid regular civil suit is ordered to be dismised. The interim injunction granted by the courts below is set aside. However, considering the facts and circumstances of the case, there shall be no order as to costs. Rule made absolute in both the revision applications.

The aforesaid findings are recorded for the purpose of disposal of these revision applications and the trial court shall dispose of the main suit according to law without being, in any manner, influenced by the observations made by this Court as aforesaid.

Learned advocate for the respondents Mr JG Shah, requests that with a view to allow the respondents to file SLP before the Hon'ble Apex Court,one month's time may be granted. The matter is pending since about 10 years, therefore, grant of short period will not have any serious consequences.The present position shall be maintained upto 30.4.2000. DS Permitted.

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